No. 01-30

SUPREME COURT, U.S.
FILED
SEP 5 2001

# In the Supreme Court of the United States

CARLOS PRIETO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
*Solicitor General*
*Counsel of Record*
MICHAEL CHERTOFF
*Assistant Attorney General*
KARIN B. HOPPMANN
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Federal Rule of Evidence 801(d)(1)(B) provides that the prior statement of a testifying witness is not hearsay if it is consistent with the witness's trial testimony, and is offered to rebut a charge of recent fabrication of improper influence or motive. The question presented is whether Rule 801(d)(1)(B) establishes a per se rule that a prior statement is inadmissible to rebut charges of recent fabrication if the declarant was under arrest when the statement was made.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 13 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Tome* v. *United States*, 513 U.S. 150 (1995) | 4, 6, 8, 13 |
| *United States* v. *Albers*, 93 F.3d 1469 (10th Cir. 1996) | 7 |
| *United States* v. *Bao*, 189 F.3d 860 (9th Cir. 1999) | 7 |
| *United States* v. *Ellis*, 121 F.3d 908 (4th Cir. 1997), cert. denied, 522 U.S. 1068 (1998) | 7 |
| *United States* v. *Forrester*, 60 F.3d 52 (2d Cir. 1995) | 9, 10, 11 |
| *United States* v. *Green*, 258 F.3d 683 (7th Cir. 2001) | 12 |
| *United States* v. *Henderson*, 717 F.2d 135 (4th Cir. 1983), cert. denied, 465 U.S. 1009 (1984) | 6, 7 |
| *United States* v. *Hill*, 91 F.3d 1064 (8th Cir. 1996) | 7 |
| *United States* v. *Khan*, 821 F.2d 90 (2d Cir. 1987) | 9, 10 |
| *United States* v. *Moreno*, 94 F.3d 1453 (10th Cir. 1996) | 8, 9 |
| *United States* v. *Roach*, 164 F.3d 403 (8th Cir. 1998), cert. denied, 528 U.S. 845 (1999) | 7 |
| *United States* v. *Stoecker*, 215 F.3d 788 (7th Cir. 2000), cert. denied, 121 S. Ct. 885 (2001) | 7 |
| *United States* v. *Toney*, 161 F.3d 404 (6th Cir. 1998), cert. denied, 526 U.S. 1045 (1999) | 7 |

Statutes and rules: Page

18 U.S.C. 924(c) ..... 2, 3
18 U.S.C. 1951(a) ..... 2, 3
Sup. Ct. R. 13(3) ..... 2
Fed. R. Evid. 801(d)(1)(B) ..... 3, 4, 5, 6, 7, 11, 13

# In the Supreme Court of the United States

No. 01-30

CARLOS PRIETO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 232 F.3d 816. The opinion of the district court is unreported.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 1b-2b) was entered on November 6, 2000. The petition for a writ of certiorari was untimely filed on May 10, 2001.[1]

[1] Petitioner states that his petition was "filed within ninety days of February 9, 2001, the date of the issuance of the mandate of the Eleventh Circuit." Pet. 1. Under this Court's Rules, however, "[t]he time to file a petition for a writ of certiorari runs from

Because no party filed a petition for rehearing in the court of appeals within ninety days of the entry of judgment, any petition for a writ of certiorari was due on February 4, 2001. See Sup. Ct. R. 13(1)-(3). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner was convicted on two counts of attempted interference with commerce by threats or violence and one count of conspiracy to interfere with commerce by threats or violence, in violation of 18 U.S.C. 1951(a), and on two counts of using or carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). He was sentenced to 378 months in prison. Pet. 2. The court of appeals affirmed.

1. In May of 1996, petitioner and several other individuals, including Rodolfo Palacios, conspired to rob a UPS truck carrying computer equipment that had been shipped in interstate commerce. Pet. App. 2a. According to their plan, two conspirators were supposed to block the truck's path and abduct the driver at gunpoint. Another conspirator, disguised as a UPS employee, would then drive the truck to an off-load site where the equipment could be transferred to another truck for future sale. *Ibid.*; Gov't C.A. Br. 8-9.

On June 4, 1996, two armed conspirators attempted to block the UPS truck, while petitioner and two others waited at the off-load site. The enterprise was aborted, however, when the would-be robbers failed to stop the truck. Gov't C.A. Br. 8-9. On June 11, two armed conspirators again tried to block the truck, while petitioner

---

the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate[.]" Sup. Ct. R. 13(3).

and another conspirator waited at the off-load site. This time, the blocking conspirators succeeded in stopping the truck, and one brandished his weapon at the driver. The robbery was again aborted, however, when the conspirators observed a car approaching and fled. Pet. App. 3a.

On February 4, 1997, a grand jury in the Southern District of Florida indicted petitioner and his co-conspirators on two counts of attempted robbery and one count of conspiracy to commit robbery, in violation of 18 U.S.C. 1951(a), and two counts of using or carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). Pet. 2; Gov't C.A. Br. 1-2. Palacios pleaded guilty to these counts in April of 1997. Pet. App. 4a. Petitioner pleaded not guilty, and he went to trial with two co-defendants in September of 1999. Gov't C.A. Br. 2.

2. At trial, Palacios testified about petitioner's involvement in the conspiracy. Tr. 52-68. On cross-examination, attorneys for petitioner and each of his co-defendants attempted to impeach Palacios by use of his plea agreement, stressing repeatedly that Palacios had agreed to testify in exchange for potential reductions in his own criminal charges and sentence. Tr. 103-115, 151-158, 178, 180-194, 199-200, 234, 238-239.

The government subsequently sought to introduce testimony from a police officer describing a prior statement Palacios had made immediately after his arrest —a statement consistent with Palacios's trial testimony. Defense counsel objected on hearsay grounds, Tr. 885, and the government invoked Federal Rule of Evidence 801(d)(1)(B), which states that a prior statement is not hearsay if the declarant testifies and is subject to cross-examination at trial, and if the statement is "consistent with the declarant's testimony and

is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Fed. R. Evid. 801(d)(1)(B); Tr. 889. Without contesting that the proffered testimony satisfied Rule 801(d)(1)(B)'s textual requirements, defense counsel claimed that the evidence constituted hearsay under this Court's decision in *Tome* v. *United States*, 513 U.S. 150 (1995). *Tome* interpreted Rule 801(d)(1)(B) as having incorporated the common law rule "that a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence [is] admissible if the statement [was] made before the alleged fabrication, influence, or motive came into being, but * * * [is] inadmissible if made afterwards." *Id.* at 156.

As they had implied during Palacios's cross-examination, defense counsel argued to the district court that Palacios had a motive to fabricate before he made his statement, namely, a motive to exchange false cooperative assistance for prosecutorial leniency: "Any time defendants are arrested, the very first thing that they are told is * * * if you have any chance of trying to help yourself out, you know, now is the time to help us out. * * * And this kind of testimony is post-arrest testimony that is colored by [Palacios's] hopes of starting on the pattern of cooperation." Tr. 890. To establish that the alleged motive to fabricate existed at the time of Palacios's statement, defense counsel requested that the district court conduct, "outside the presence of the jury, a hearing to determine whether or not there [was] any discussion about his cooperation at this point in time." Tr. 895.

3. The district court acceded, and held an in limine hearing to determine whether Palacios's alleged motive to fabricate predated his October 24 statement, or

whether that motive arose only later in the investigation and pretrial negotiations. Tr. 906-934. The government offered testimony from an FBI agent who had observed and accompanied Palacios from the time of his arrest until the time his statement was taken. Tr. 923-932. The agent stated that no one had spoken to Palacios about any possible benefits of cooperating with the government. Tr. 924-925. Palacios had been told only that he was under arrest for "Hobbs Act robbery," and Palacios himself said nothing more than was required for his formal acceptance into custody. Tr. 927-928, 931-932. The agent further testified that, when Palacios gave his statement, he appeared "very remorseful, he was teary eyed. He just began and just started talking." Tr. 926. A police officer who had witnessed Palacios's statement also testified at the hearing; he stated that neither before nor during Palacios's statement did Palacios or any law enforcement agent mention possible cooperation with the government. Tr. 915-920.

The following day, after oral argument, the district court found "from the testimony that was taken that [Palacios's] statement clearly predated and [sic] the motive to fabricate or to obtain a better deal." Pet. App. 6a (quoting Tr. 953). Thus, the district court ruled that the proffered testimony was not hearsay under Rule 801(d)(1)(B), and constituted admissible evidence. Tr. 953. The jury convicted petitioner on all counts. Pet. App. 3a.

4. The Eleventh Circuit affirmed, holding that the district court had not abused its discretion in applying Rule 801(d)(1)(B). Pet. App. 4a-11a. The court of appeals determined that the district judge had "squarely found as a matter of fact that Palacios did not have a motive to fabricate at the time of his statement[]," and

the court found that conclusion not clearly erroneous. *Id.* at 6a.

The Eleventh Circuit also rejected petitioner's argument that Rule 801(d)(1)(B), as construed by *Tome*, *supra*, requires a per se rule against admitting prior statements made after the declarant has been arrested. Pet. App. 7a-11a. The Eleventh Circuit noted that several other courts of appeals had, contrary to petitioner's argument, deemed certain post-arrest statements admissible. The Eleventh Circuit further predicted that petitioner's theory, if adopted, would "effectively swallow[] the rule with respect to prior consistent statements made to Government officers: by definition such statements would never be prior to the event of apprehension or investigation by the Government which gave rise to motive to falsify." *Id.* at 8a (quoting *United States* v. *Henderson*, 717 F.2d 135, 139 (4th Cir. 1983) (court's alteration), cert. denied, 465 U.S. 1009 (1984)). "[G]iven the variety of motives that may influence an individual's decision to confess, we are convinced that * * * a *per se* rule mistakenly would take all discretion from the trial judge in a fact intensive context calling for just the opposite result—an individualized and careful calibration of complex fact." *Id.* at 11a.

## ARGUMENT

The Eleventh Circuit's holding in this case does not conflict with that of any other court of appeals. The record supports the district court's factual finding that Palacios had no motive to fabricate at the time of his statement. Further review is not warranted.

1. Petitioner asserts that, in declining to find Palacios's post-arrest statement inadmissible, the Eleventh Circuit created a "clear conflict" (Pet. 5) over

whether Rule 801(d)(1)(B) requires courts conclusively to presume a motive to fabricate from the moment a declarant is placed under arrest. Contrary to petitioner's assertion, however, no court of appeals has adopted petitioner's per se rule regarding post-arrest statements. Indeed, no court of appeals has even discussed the argument except the Eleventh Circuit in this case. Rather, each court of appeals that has addressed such matters has resolved them on a contextual, fact-specific, case-by-case basis. Courts have deemed certain post-arrest statements admissible, see, *e.g.*, *United States* v. *Stoecker*, 215 F.3d 788, 791 (7th Cir. 2000), cert. denied, 121 S. Ct. 885 (2001); *United States* v. *Roach*, 164 F.3d 403, 411 (8th Cir. 1998), cert. denied, 528 U.S. 845 (1999); *United States* v. *Hill*, 91 F.3d 1064, 1071 (8th Cir. 1996), and other post-arrest statements inadmissible, see, *e.g.*, *United States* v. *Bao*, 189 F.3d 860, 864-865 (9th Cir. 1999); *United States* v. *Albers*, 93 F.3d 1469, 1483 (10th Cir. 1996).[2] But petitioner has not shown that the present range of cases requires intervention by this Court. Indeed, the current judicial authorities typify the gradual, common law jurisprudence implicitly endorsed in *Tome*: "We are aware that in some cases it may be difficult to ascertain when a particular fabrication, influence, or motive arose. Yet * * * a majority of common-law

---

[2] See generally *United States* v. *Toney*, 161 F.3d 404, 408-409 (6th Cir. 1998) (noting that a district court's factual analysis in applying Rule 801(d)(1)(B) deserves significant deference), cert. denied, 526 U.S. 1045 (1999); *United States* v. *Ellis*, 121 F.3d 908, 920 n.16 (4th Cir. 1997), cert. denied, 522 U.S. 1068 (1998) (observing, without deciding, that post-arrest statements might not constitute hearsay, for the reasons discussed in *United States* v. *Henderson*, 717 F.2d 135, 138-139 (4th Cir. 1983), cert. denied, 465 U.S. 1009 (1984)).

courts were performing this task for well over a century, * * * and [there is] no evidence that those courts * * * have been unable to make the determination." *Tome*, 513 U.S. at 165-166.

The two cases petitioner relies upon are not to the contrary. In *United States* v. *Moreno*, 94 F.3d 1453 (10th Cir. 1996), the government sought to bolster testimony from an impeached witness, who said he had worked with the defendant in smuggling narcotics, by introducing a prior statement that the witness made to his lawyer in anticipation of a plea bargain. The Tenth Circuit held that the government's evidence was hearsay in that particular case, but it never addressed, much less decided, whether all post-arrest statements should be inadmissible.[3] *Id.* at 1455. Indeed, the court of appeals in *Moreno* upheld the conviction on harmless error grounds. *Id.* at 1455-1456.

Furthermore, the facts of *Moreno* differ significantly from those at issue here. Unlike Palacios, the witness in *Moreno* had already talked with his lawyer at the time of his statement, and it appears likely that the declarant and his co-conspirator had already been indicted. See *Moreno*, 94 F.3d at 1454 (explaining details of the investigation and the criminal allegations at stake). In this case, the record shows that Palacios's statement was made with virtually no information having been provided to him concerning the events or persons under government investigation. Tr. 924-932. Palacios had not been told that the investigation concerned attempted UPS robberies, he had not learned

---

[3] On the contrary, the Tenth Circuit rejected an apparent per se rule imposed by the district court, which had refused to recognize any motive to fabricate until the declarant signed a plea agreement. See *Moreno*, 94 F.3d at 1455.

whether the government was investigating a conspiracy, and he had not been told any potential suspects' names. *Ibid.*

In the absence of such basic information about an ongoing criminal investigation's targets and status, it seems clear that witnesses would sometimes, perhaps even typically, possess no motive to fabricate. The more sensible motive under such circumstances might favor silence or truthfulness, since "cooperative" fabrications give cold comfort if they are eventually proved false. Cf. *United States* v. *Khan*, 821 F.2d 90, 94 (2d Cir. 1987) (noting that a witness does not always "enhance his chances for a cooperation agreement by making false accusations"). Thus, although the *Moreno* court suggested that the witness "had an incentive to concoct a story * * * as soon as he was arrested," 94 F.3d at 1455, the prior statement actually held inadmissible in that case was not taken immediately post-arrest, and the case did not involve a declarant who was uninformed about the criminal investigation underway.

The other case petitioner cites, *United States* v. *Forrester*, 60 F.3d 52 (2d Cir. 1995), similarly fails to demonstrate any "clear" or imminent circuit conflict. The Second Circuit in *Forrester*, like the Tenth Circuit in *Moreno* and the Eleventh Circuit here, declined to announce any per se rule regarding post-arrest statements. Indeed, *United States* v. *Khan*, 821 F.2d 90 (2d Cir. 1987), indicates that the Second Circuit has not accepted petitioner's proposed rule. *Khan* concerned a prior statement by an impeached government witness, Shahraiz Hussain Sheikh, who claimed he had sold drugs with the defendant. On appeal, the defendant claimed that Sheikh had a "motive to lie in order to obtain a cooperation agreement and reduce his own sentence." *Id.* at 94. The defendant also claimed that

Sheikh's motive to fabricate "arose the moment he was arrested, when his relationship with [the investigating] DEA Agent Gallo began and his initial debriefing took place." *Ibid.* The Second Circuit, applying the same common law rule later applied in *Tome*, rejected the defendant's argument: "We believe under the circumstances * * * that Sheikh was unlikely to enhance his chances for a cooperation agreement by making false accusations to Agent Gallo. Sheikh also had no apparent motive to falsely accuse Khan in particular, especially since he implicated Khan nearly three months prior to Khan's arrest. Thus, on balance, we are unpersuaded that Sheikh had a motive to lie * * * when he made the prior consistent statement." *Ibid.* (citation omitted). Similarly, in petitioner's case, testimony at the evidentiary hearing persuaded the district court that Palacios's alleged motive to lie did not, as a factual matter, exist at the time of his statement. Especially in light of *Khan*, petitioner's alleged conflict between the Second and Eleventh Circuits is not at all evident.

Moreover, the facts of *Forrester* are distinct from petitioner's case. *Forrester* involved the government's effort to bolster an impeached witness who claimed she had been the defendant's drug courier. 60 F.3d at 57-58, 64-65. The declarant's prior statement in that case was not a spontaneous oral declaration to the police, like Palacios's in this case. Instead, the statement in *Forrester* was a written document that the witness had prepared three weeks after her interview with a police officer. *Id.* at 64. The Second Circuit found that, in the context of the ongoing criminal investigation, the witness in *Forrester* possessed a motive to fabricate that clearly "existed before she drafted the contested statement." *Ibid.* And though the Second Circuit did

not list specific facts supporting its conclusion,[4] the court did suggest that the application of Rule 801(d)(1)(B) constitutes a fact-bound inquiry that should be based on the "trial record." *Ibid.* Furthermore, it is clear from the facts the Second Circuit did describe that *Forrester*'s result does not contradict the Eleventh Circuit's decision here. As in *Moreno*, the witness in *Forrester* had ample time to gather information about the government's investigation. Thus, unlike Palacios, she also had a significant opportunity to contrive a story implicating other suspects, with less risk that her story would be discovered as a fabrication.

In sum, the differences in outcome thus far reached by the courts of appeals reflect substantial variations in the facts that have been presented, and do not necessarily indicate any difference in the legal standards that the courts of appeals have applied. Further experience in the lower courts in additional factual contexts is needed before it can be ascertained whether this Court's intervention would be appropriate.

2. A particular aspect of this case, which further distinguishes *Moreno* and *Forrester*, counsels that it may be of limited utility as a vehicle for addressing the

---

[4] Like *Moreno*, *Forrester* was a case whose application of Rule 801(d)(1)(B) was ancillary to its result. The Second Circuit's opinion primarily concerned two erroneous hearsay rulings, unrelated to Rule 801(d)(1)(B), regarding declarations by the complainant, Doris Rodriguez. 60 F.3d at 60-62. Those two errors, and not the district court's application of Rule 801(d)(1)(B), were the only express basis for the Second Circuit's decision to reverse. 60 F.3d at 64-65 ("In our view, the erroneously-admitted Rodriguez declarations are sufficient to require a new trial. * * * The errors with respect to * * * the prior consistent statement only exacerbated the undue prejudice created by the Rodriguez declarations.").

issues petitioner raises. As the Eleventh Circuit noted, the district court in this case based its ruling on an explicit factual finding that Palacios had no motive to fabricate at the time he made his statement. The standard for reviewing such an evidentiary ruling is abuse of discretion. See, *e.g.*, *United States* v. *Green*, 258 F.3d 683, 689 (7th Cir. 2001).

Of distinctive relevance is the context in which petitioner's claim was presented to the district court. During cross-examination, defense counsel repeatedly emphasized Palacios's motive to fabricate based on his plea agreement and his cooperation before and after signing that agreement. Tr. 103-115, 151-158, 178, 180-194, 199-200, 234, 238-239. Petitioner never asserted or suggested, during that cross-examination, that Palacios had a motive to lie before such cooperation began. Indeed, upon the government's proffer of Palacios's prior statement, the defense insisted, and obtained a hearing to attempt to prove, that Palacios had already begun to cooperate before he made his statement. Tr. 895, 906-934. Defense counsel did not suggest during the hearing, or at any other point during the trial, that Palacios had a motive to fabricate independent of discussions about cooperation. Neither the Tenth Circuit in *Moreno* nor the Second Circuit in *Forrester* confronted a comparably clear factual finding by a district court.

3. Finally, the Eleventh Circuit was correct to reject petitioner's proposed per se rule. As that court indicated, "a variety of motives may drive a person's decision to disgorge the details of a crime he has committed." Pet. App. 9a. Petitioner has offered no reason why a trial court should be required to assume that one of those potential motives—a hope for cooperation and leniency—inevitably exists. Moreover, a rule to

exclude all post-arrest statements for a testifying co-conspirator would sweep too broadly. For example, an innocent declarant arrested by mistake, or a declarant who was told that implicating others would not be rewarded, would have little or no apparent motive to fabricate. The magnitude and existence of such a motive, therefore, is highly dependent on context and particular facts. And, as the court of appeals pointed out, petitioner's proposed rule would render Rule 801(d)(1)(B) ineffective as applied to declarants who are implicated in the crime under investigation, because most such statements would arise after an arrest, or at least after a criminal investigation of the declarant had begun. *Id.* at 8a. Thus, even in cases like this one, where the district court found that no preexisting motive to fabricate existed, such a per se bar would deny the government and the fact finders use of prior statements that the principles of Rule 801(d)(1)(B) and *Tome*, *supra*, properly permit.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*
MICHAEL CHERTOFF
*Assistant Attorney General*
KARIN B. HOPPMANN
*Attorney*

SEPTEMBER 2001